



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-93-17

### FACTS:

You are a school teacher and a member of the Board of Selectmen (Board) in the Town of XYZ (Town). You have complied with the provision of the Selectman's exemption to G.L. c. 268A, §20 to hold both posts simultaneously.<sup>1/</sup>

The Town has a Town Manager form of government and the Board is the appointing authority for the Town Manager. As the appointing authority, the Board also negotiates the terms of the Manager's contract, and evaluates his performance.

Recently the education reform bill was enacted into law at the state level. This law established that in towns with a Town Manager form of government, the Town Manager is to act as a voting member of the collective bargaining team for the School Department in the Town. Since your Town Manager is currently involved in determining the wages, hours, and terms and conditions of employment for the School Department employees (including yourself), you wish to know whether as a Selectman you may evaluate the Manager and re-negotiate any aspect of the Manager's contract.

### QUESTION:

Can a Selectman, who is also a teacher, evaluate the Town Manager's performance or re-negotiate his contract, where the Manager is negotiating on behalf of the School Department?

### ANSWER:

No, unless the re-negotiation of the Manager's contract or the evaluation involves only incidental terms or conditions of employment, such as retirement benefits, overtime compensation and the like.

### DISCUSSION:

#### Section 19

Section 19 prohibits municipal employees from participating<sup>2/</sup> in particular matters<sup>3/</sup> in which they or their immediate family members<sup>4/</sup> have a financial interest. *See, e.g. EC-COI-89-19.* The financial interest must be "direct and immediate, or at least reasonably foreseeable." *EC-COI-84-123; 84-98; 86-25; 84-96.* Participation includes discussion and informal lobbying of colleagues, as well as voting (binding and non-binding). *EC-COI-92-30.* Under §19, if *any* financial interest is implicated, no matter how small, or whether the affect is positive or negative, participation is impermissible. *EC-COI-84-96.*

A contract is a particular matter for purposes of the conflict of interest law, as is the decision whether or not to re-negotiate a contract. G.L. c. 268A, §1(k). Moreover, evaluating an employee's performance or re-negotiation of a contract constitutes participation in a particular matter. Thus the issue here is whether, as a member of the School Department, you will have a reasonably foreseeable financial interest in the Manager's contract or in a decision to re-negotiate his contract which would prevent you from participating in either a re-negotiation of the Manager's contract or an evaluation of his performance.

In *EC-COI-86-25*, the Commission held that a City Council member who was also an employee of the

Massachusetts Teachers Association (MTA) could not appoint a School Committee member, where the School Committee was in negotiation with the MTA's local affiliates, as the MTA had a financial interest in the selection of the School Committee member. Similarly, we conclude here that if the proposed re-negotiation of the Manager's contract contemplates the Manager's re-appointment or conditions upon which he can continue employment, then you may not participate in such re-negotiation since it will determine whether or not the Town Manager continues to participate in the union negotiations, which in turn will affect your own financial interest. *See Advisory No. 11; EC-COI-86-25.*

Conversely, you will not have a financial interest in the mere evaluation of the Manager's performance (where re-appointment is not at issue), or the re-negotiation of the incidental terms or conditions of the Manager's continuing employment (e.g. retirement benefits, overtime compensation and the like). Thus, you may participate in negotiations contemplating incidental terms or conditions of the Manager's employment under §19.

### **Section 23**

To the extent that §19 allows you to participate in the evaluation of the Town Manager or the re-negotiation of his contract, you will be required to comply with G.L. c. 268A, §23. Section 23 establishes standards of conduct for all public employees.

Section 23(b)(2) prohibits a public official from using his position to secure an unwarranted privilege of substantial value<sup>5/</sup> which is not properly available to similarly situated individuals. Section 23(b)(2) requires that you apply objective standards to any matters involving the Manager, and that you not allow the fact that he will be negotiating with the School Department to affect your judgment. *See EC-COI-92-32; 89-23; 89-3.*

Additionally, §23(b)(3) prohibits a public employee from acting in a manner which would cause a reasonable person to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. This is the so-called "appearances" section of c. 268A. The appearance of a conflict of interest can be dispelled by making a full written disclosure of the relevant facts to the employee's appointing authority, or if no appointing authority exists, by making a public disclosure. A §23(b)(3) disclosure is necessary "whenever there exists a potential for serious abuse of a public position by a public employee. This potential for serious abuse need not involve any financial interest on the part of the other party." *EC-COI-92-3* (emphasis in original). Thus, to the extent that §19 does not prohibit your participation in the evaluation of the Town Manager or re-negotiation of his contract, you will be required to file a written disclosure with the Town Clerk concerning your interest as an employee of the school department.

**DATE AUTHORIZED: August 9, 1993**

<sup>1/</sup>Section 20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by *any* municipal agency of the same city or town, in which the city or town is an interested party, unless an exemption applies. The propriety of holding multiple municipal positions is addressed by §20. *See Commission Advisory No. 7.* The Selectmen's exemption allows a municipal employee to simultaneously hold the position of Selectman, and allows the employee to perform the duties of or receive the compensation provided for such office; provided, however, that the Selectman does not receive compensation for more than one office or position held in a town; provided, further, that no such selectman may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility; and, provided further, that no such selectman shall be eligible for appointment to any such additional position while he is still a member of the board of selectmen or for six months thereafter.

<sup>2/</sup>"Participate", participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

<sup>3/</sup>"Particular matter", any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactments of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers duties, finances and property. G.L. c. 268A, §1(k).

<sup>4/</sup>"Immediate family", the employee and his spouse, and their parents, children, brothers and sisters.

<sup>5/</sup>Anything valued at \$50 or more is "of substantial value." *Commonwealth v. Famigletti*, Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8.*